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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of)	MB Docket No. 08-214
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7709-P
Complainant)	
v.)	
Time Warner Cable Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7822-P
Complainant)	
v.)	
Bright House Networks, LLC,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7829-P
Complainant)	
v.)	
Cox Communications, Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7907-P
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	
)	
NFL Enterprises LLC,)	File No. CSR-7876-P
Complainant)	
v.)	
Comcast Cable Communications, LLC)	
Defendant)	
)	
TCR Sports Broadcasting Holding, L.L.P.,)	File No. CSR-8001-P
d/b/a Mid-Atlantic Sports Network,)	
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	

To: The Commission

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FURTHER SUPPLEMENT TO EMERGENCY APPLICATION FOR REVIEW AND EMERGENCY MOTION FOR STAY

Comcast Corporation and Comcast Cable Communications, LLC (collectively "Comcast"), by their attorneys and on behalf of Time Warner Cable Inc., Bright House Networks, LLC and Cox Communications, Inc., hereby supplement the Emergency Application for Review and Emergency Motion for Stay filed in the above-captioned proceedings on December 30, 2008, and supplemented on January 2, 2009.¹

I. INTRODUCTION AND SUMMARY

Comcast and the other Defendants make this filing to bring to the Commission's attention the Media Bureau's *Supplemental Information Order* issued in the above-captioned cases on the eve of the Inauguration/Martin Luther King, Jr. holiday weekend.² The *Supplemental Information Order* lends fresh urgency to the need for the full Commission to act on the Emergency Application and Emergency Stay. As discussed below, the *Supplemental Information Order* represents a rush to judgment that suggests improper prejudgment by the Media Bureau.

The order makes clear that the Media Bureau is not going to allow the Commission time to address what the Chief Administrative Law Judge ("Chief ALJ") has termed the "unique state of confusion on jurisdiction" created by the Bureau's unlawful *Christmas Eve* and *New Year's Eve Orders*.³ The Media Bureau has announced that it is pressing forward with these cases

¹ Emergency Application for Review (Dec. 30, 2008) and Supplement to Emergency Application for Review (Jan. 2, 2009) (collectively "Emergency Application"); Emergency Motion for Stay (Dec. 30, 2008) and Supplement to Emergency Motion for Stay (Jan. 2, 2009) (collectively "Emergency Stay").

² *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, MB Docket No. 08-214, *Memorandum Opinion and Order*, DA 09-55 (MB rel. Jan. 16, 2009) ("*Supplemental Information Order*").

³ *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, MB Docket No. 08-214, *Order*, FCC 09M-05, ¶ 8 (ALJ rel. Jan. 12, 2009) ("*Hearing Stay Order*"). See also *Herring*

notwithstanding the serious questions about its authority to do so and the prejudice this process presents to the Defendants.⁴ It is fundamentally unfair for the Bureau to proceed to a decision on the merits when it has no legal authority to make any determinations. Moreover, the Media Bureau has now made clear that, despite its earlier decision to refer these cases for hearing before an administrative law judge,⁵ it will decide them *without* meaningful document production, depositions, live testimony and cross-examination, all of which former Administrative Law Judge Steinberg and the Chief ALJ found to be essential to resolving these cases in an orderly and expedited manner that comports with the requirements of due process. The Media Bureau's procedural haste and its decision to abandon trial-type hearing procedures clearly suggest that the Media Bureau has prejudged a number of critical factual questions in dispute and the related witness credibility issues.

The Media Bureau thus places Comcast and the other Defendants in the untenable position of having to devote significant resources to participating in a separate, unlawful and fundamentally unfair process, despite the high likelihood that the Emergency Application will succeed on the merits and these cases will be returned to the Chief ALJ for hearing. The Commission should act immediately to end this waste of resources by ordering resumption of the ALJ hearing without further delay. At a minimum, the Commission should instruct the Media

Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al., MB Docket No. 08-214, *Memorandum Opinion and Order*, DA 08-2805 (MB rel. Dec. 24, 2008) ("*Christmas Eve Order*"); *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, *Memorandum Opinion and Order*, DA 08-2819 (MB rel. Dec. 31, 2008) ("*New Year's Eve Order*").

⁴ The Media Bureau's action stands in stark contrast to the Chief ALJ's decision to stay the hearings "in order to maintain respect for and confidence in the FCC's ALJ hearing procedures that have been utilized since 1934, and for administrative efficiencies," despite his own significant questions regarding the Media Bureau's authority to reassert jurisdiction in this matter. *Hearing Stay Order* ¶ 10.

⁵ See *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, 23 FCC Rcd 14787 (MB 2008) ("*HDO*").

Bureau to rescind the *Supplemental Information Order* in order to preserve the *status quo ante* until the Commission resolves the confusion over jurisdiction caused by entry of the *Christmas Eve* and *New Year's Eve Orders*.

II. THE SUPPLEMENTAL INFORMATION ORDER IS A RUSH TO JUDGMENT AND SUGGESTS PREJUDGMENT BY THE MEDIA BUREAU

The *Supplemental Information Order* directs the parties (1) to supplement and update the existing record as to certain discrete questions and (2) to file with the Bureau "a best and final offer for the price for carriage of the complainant's network on the defendant's systems and explain the justification for such offer" by January 28, 2009.⁶ The Bureau offers the parties the opportunity to file legal briefs by February 6, 2009⁷ and commits to resolving all six cases starting a week later.⁸

As discussed below, however, the *Supplemental Information Order* not only disregards critical factual questions and related witness credibility issues but also truncates the discovery and fact-finding that must take place in order to achieve fair, reasonable, and legally sustainable results in these cases. In addition, the questions posed by the Media Bureau appear improperly to place the burden of *disproving* discrimination on the Defendants.⁹ This lack of meaningful fact-finding and procedural haste suggests a fundamental prejudgment by the Media Bureau with regard to most of the major issues in these cases. As predicted by ALJ Steinberg, the result of the Media Bureau's action will be "the distinct possibility of a remand for additional evidentiary

⁶ *Supplemental Information Order* ¶¶ 3-9.

⁷ *Id.* ¶ 11.

⁸ The Bureau proposes to resolve all four WealthTV cases by February 13, 2009, the MASN case by February 20, 2009, and the NFL case by February 27, 2009. *Id.* ¶ 12.

⁹ See *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, MB Docket No. 08-214, Order, FCC 08M-44 (ALJ rel. Oct. 23, 2008) (Complainants have the burden of proof); Hearing Tr. at 8 (same).

hearings resulting, ultimately, in an unnecessary and undue delay in the final resolution of this complicated proceeding.”¹⁰

A. The Supplemental Information Order Disregards Critical Factual and Related Witness Credibility Issues

The Media Bureau is seeking supplemental and updated evidence and arguments only with regard to discrete questions that do not, on their face, reflect the full scope of the unresolved factual and related credibility issues in these cases.¹¹ With respect to the numerous unresolved factual and credibility issues not covered by the Media Bureau, the *Supplemental Information Order* represents a complete reversal of the Media Bureau’s conclusions in the HDO that it was “unable to determine on the basis of the existing records whether [it] can grant relief”¹² and that an ALJ hearing was needed to resolve such factual and credibility issues. Indeed, as Judge Steinberg put it, “an examination of the *HDO* will reveal” that each of the six cases presents “unique” and “intricate” factual disputes and “the credibility of several witnesses [are] at issue due to their differing recollections and expert witnesses’ statements are also involved.”¹³ The *HDO* itself expressly refers to “several” factual disputes that could not be resolved on the basis of the existing record,¹⁴ and designates broad discrimination and remedy issues for trial-type hearings. It recites, over dozens of pages, the parties’ differing views of the facts without making factual findings.¹⁵

¹⁰ *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, MB Docket No. 08-214, *Memorandum Opinion and Order*, FCC 08M-47, ¶ 7 (ALJ rel. Nov. 20, 2008), *Erratum* (rel. Nov. 21, 2008) (“*ALJ Due Process Order*”).

¹¹ *Supplemental Information Order* ¶¶ 3-9.

¹² *HDO* at 14792.

¹³ *ALJ Due Process Order* ¶ 7.

¹⁴ *HDO* at 14792, 14814, 14827, 14829, 14843.

¹⁵ Numerous factual disputes remain to be decided in all six cases. For example, as discussed below, in the WealthTV cases, questions regarding whether MOJO and WealthTV were similarly

The complexity of the factual disputes in these cases was further emphasized in the Status Reports the parties filed with the Chief ALJ on January 7, 2009. As the Chief ALJ concluded:

The Reports also show the complexities of issues to be heard and decided. The need for expert assistance to explain and clarify issues is recognized. . . . Evidence of each complaining party's programming and market conditions is essential. Experts are retained to testify on economic effects of defined market power in defined markets. Experts for complaining parties will offer opinion based on evidentiary facts of record to show, for example, that Comcast's decision to move NFL to a prime sports tier was otherwise than an efficient, non-discriminatory business decision . . . In turn, Comcast must present opposing testimony of experts to show that Comcast is engaged in non-discriminatory business conduct¹⁶

The questions presented in the *Supplemental Information Order* are in no way adequate to address such complex issues. They do not reach critical programming and market issues such as those identified by the Chief ALJ. Nor does the *Supplemental Information Order* give parties the opportunity to test opposing parties' evidence through discovery and cross-examination.¹⁷ Perhaps most critical, the *Supplemental Information Order* is silent with regard to the need to test witness credibility.¹⁸ The Media Bureau has provided no legitimate justification for its abrupt

situated networks, and whether the Defendants' carriage decisions unlawfully restricted WealthTV's ability to compete remain in dispute. See *infra* at Section II.C. The *HDO* also left open numerous factual issues in the MASN case. See *HDO* at 14836-14842. Similarly, in the NFL case, the *HDO* summarizes the NFL's claims and Comcast's defenses all without rendering affirmative factual findings. See *id.* at 14815-19.

¹⁶ *Hearing Stay Order* ¶¶ 3-4.

¹⁷ On this point, the *Supplemental Information Order* stands in stark contrast to the Chief ALJ's statement that the "attorneys on both sides recognize full well the complexities involved and understand that focused discovery requires discrete document requests that should be trimmed, but complied with." *Id.* ¶ 5.

¹⁸ Indeed, both Judge Steinberg and the Chief ALJ have recognized testing witness credibility to be critical to resolving these and the numerous, "complex" factual issues in dispute. *ALJ Due Process Order* ¶ 7; see also *Hearing Tr.* at 85; *Hearing Stay Order* ¶ 3.

change in direction, disregarding the need for trial-type hearings in favor of paper proceedings that improperly narrow, misstate, or ignore the major factual and credibility issues in these cases.

B. The Supplemental Information Order Improperly Truncates the Discovery and Fact-Finding Necessary to Resolve These Cases

Even assuming the Media Bureau had authority to seize jurisdiction from the ALJ, the *Supplemental Information Order* sets unrealistic time frames for the parties' responsive filings and consideration of these matters. The *Supplemental Information Order* requires parties to respond to the Bureau's document requests by January 28, 2009, a mere six business days (12 calendar days) after the Bureau's order.¹⁹ Legal briefs are to follow nine days later, with the Bureau releasing orders on the merits from between seven days later in the WealthTV cases to 21 days later in the NFL case.²⁰ In short, the Media Bureau apparently expects to receive and review a substantial amount of new evidence and legal arguments from eight different parties, reach conclusions, and draft orders for six different cases, all within roughly 30 days.

Based on his "more than 32 years of experience as both a Trial Attorney and an Administrative Law Judge," however, Judge Steinberg concluded that conducting six hearings and rendering decisions in 60 days would "make it impossible to develop a full and complete record and afford the parties their due process rights"²¹ and considered the time frame to be "ludicrous."²² The Chief ALJ concurred, emphasizing that:

60 days could not support even limited discovery, hearing, briefing, and recommended decision under the Administrative

¹⁹ *Supplemental Information Order* ¶ 2.

²⁰ *Id.* ¶¶ 11-12. These few weeks should be compared to the two to nine months the Bureau needed to review the original pleadings and designate all six cases for hearing before the ALJ.

²¹ *ALJ Due Process Order* ¶ 7 and n.8.

²² Hearing Tr. at 36.

Procedure Act (APA). In other words, affording all parties procedural due process within 60 days was out of the question.²³

If 60 days is insufficient to resolve the fact issues presented by the original filings, it follows that the new, truncated schedule is not sufficient to resolve those issues plus additional factual issues presented by the supplemental submissions consistent with due process.

The Bureau's unwarranted haste in these matters is even more curious given the timing of the *Christmas Eve*, *New Year's Eve*, and *Supplemental Information Orders*. As the Chief ALJ noted, "all participants were on actual notice that there would be intense discovery and a hearing involving experts and lengthy cross-examinations that necessarily would lead into calendar year 2009" as early as December 11, 2008.²⁴ Inexplicably, however, the Media Bureau waited two weeks before trying to reclaim jurisdiction on Christmas Eve. The Bureau then took an additional three weeks to decide on the questions it wanted to ask and to issue the *Supplemental Information Order*. It is unseemly for the Bureau to turn around and give parties a mere six business days to produce their new and supplemental evidence and slightly more than a week to file legal briefs, given the delays in the Bureau's own actions.

C. The *Supplemental Information Order* Suggests Prejudgment by the Media Bureau

The Media Bureau's apparent willingness to ignore critical facts and issues together with its obvious rush to resolve these cases suggest that the Bureau has already reached judgment on the merits of these cases. The substance of the *Supplemental Information Order* bolsters this conclusion. For instance, one issue in dispute is whether the WealthTV and MOJO networks are

²³ See *Hearing Stay Order* ¶ 6.

²⁴ *Id.* ¶ 7.

similarly situated.²⁵ Although the *HDO* concludes that the complainant is not required to show that WealthTV and MOJO are identical, it provides no analysis on the legally relevant question of whether the networks are similarly situated for purposes of WealthTV's discrimination allegations.²⁶ The *Supplemental Information Order*, however, does not expressly seek evidence on this point, despite the Bureau's previous decision to designate this and other discrimination questions for hearing. This omission suggests that the Media Bureau has now concluded that the two networks are similarly situated and that the Defendants discriminated against WealthTV.

Similarly, the *HDO* assumes, without any evidence or analysis (other than conclusory statements), that the effect of the alleged discrimination by each Defendant was to "unreasonably restrain the ability of WealthTV to compete fairly" in the marketplace.²⁷ The Bureau apparently has now prejudged this issue in complainant's favor, since the *Supplemental Information Order* presents no questions requiring WealthTV to prove competitive harm or asking the Defendants to submit evidence that shows that the alleged discrimination did not, or could not, unreasonably restrain the ability of WealthTV to compete fairly.

Further, the Media Bureau has yet to receive any evidence with regard to the question of remedy should it conclude that Comcast and the other Defendants violated 47 C.F.R. § 76.1301(c) of the Commission's rules. The *Supplemental Information Order* asks only for evidence related to the price for mandatory carriage, ignoring other potential remedies and numerous critical terms related to carriage such as the length of term of carriage and the scope of distribution.²⁸ On the other hand, the Media Bureau attempts to dictate other carriage details,

²⁵ *HDO* at 14795-97, 14801, 14806, 14811-12..

²⁶ *Id.* at 14797, 14801, 14806, 14811-2.

²⁷ *Id.* at 14798, 14802, 14807, 14812.

²⁸ *Supplemental Information Order* ¶ 9.

such as the tier of service upon which each of the complainants will be carried, before receiving evidence on these points.²⁹

In short, the Media Bureau seems to have assumed that the decisions are in complainants' favor and selected mandatory carriage as the remedy. Such action on the part of the Media Bureau flies in the face of the Commission's rules, which place the burden first on the complainant for stating the terms it seeks in order to allow the defendant an opportunity to respond.³⁰ This is particularly problematic given the substantial First Amendment concerns raised by mandatory carriage. A Bureau decision mandating the terms and conditions of mandatory carriage by administrative fiat without a basis in any record evidence would be most offensive to the First Amendment.

III. CONCLUSION

The need for Commission intervention in this matter is acute. The Media Bureau has made clear its total disregard for the findings by both Judge Steinberg and the Chief ALJ that an orderly, expeditious, and fair resolution of these cases require meaningful document production, depositions, live testimony, and cross-examination. The Media Bureau has also ignored the serious and novel legal questions pending before the Commission – recognized by the Chief ALJ – regarding the Bureau's legal authority to interfere with the hearing process as it has done. Instead, and in a context where the Bureau lacks authority, it is attempting to rush these cases to

²⁹ *Id.* n.18 (“In the case of WealthTV, the price will be for carriage on the tier on which the defendant carried MOJO. In the case of the NFL Network, the price will be for carriage on the expanded basic tier. In the case of MASN, the price will be for carriage on the expanded basic tier.”)

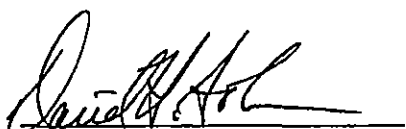
³⁰ See 47 C.F.R. §§ 76.6(a)(1), 76.1302(d)(2); *see also In re Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642 ¶ 27 (1993).

conclusion without any of the hearing procedures to which the Defendants are entitled and without bothering to develop more than a minimal evidentiary record, or any record at all, on which to resolve many critical outstanding issues and make necessary witness credibility assessments.

Such a rush to judgment should not be condoned, particularly in the context of program carriage disputes, which necessarily involve sensitive First Amendment issues. To the contrary, the Commission and its staff should observe the strictest regard for due process before substituting their judgment for the constitutionally protected editorial judgment of a cable operator. The Commission should act immediately to intervene in this matter so that the hearing and discovery process already underway in the ALJ proceeding may be resumed without further delay. Prompt return of the cases to the Chief ALJ is the best way to ensure expedited and legally sustainable decisions on these matters. At a minimum, the Commission should immediately instruct the Media Bureau to rescind the *Supplemental Information Order* in order to preserve the *status quo ante* until the Commission resolves the Emergency Application.

Respectfully submitted,

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Date: January 26, 2009

CERTIFICATE OF SERVICE

I, Marc D. Knox, hereby certify that, on January 26, 2009, copies of the attached Supplement to Emergency Motion for Stay were served by United States Mail, first class postage prepaid, and email to the following:

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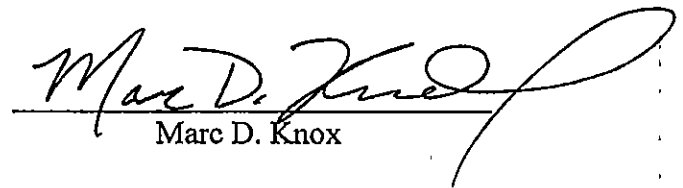
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